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Nos. 95-1681, 95-1682 and 95-1710

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF LOUISIANA, ET AL., APPELLANTS

v.

RAY HAYS, ET AL.

LOUISIANA LEGISLATIVE BLACK CAUCUS, ET AL., APPELLANTS

v.

RAY HAYS, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

RAY HAYS, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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1. Appellees contend (Mot. to Dis. 11-13) that the appeals in this case are moot because Louisiana has recently enacted legislation (Act 96) that repeals Act

1 and adopts the district court's remedial redistricting plan. Act 96, however, has not been precleared under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Unless and until it is precleared, Act 96 is not effective as law. *Clark* v. *Roemer*, 500 U.S. 646, 652-653 (1991). As the Court explained in *Clark*:

> Section 5 requires States to obtain either judicial or administrative preclearance before implementing a voting change. A voting change in a covered jurisdiction "will not be effective as la[w] until and unless cleared" pursuant to one of these two methods.

Ibid. Because Act 96 is not effective as law, it cannot affect the viability of the present appeals.

Appellees contend (Mot. to Dis. 12) that Act 96 is not subject to Section 5 preclearance because it does not constitute a "change" in the State's voting practices. As the text of Section 5 makes clear, however, an unprecleared voting practice is a "change" subject to preclearance when the practice is "different from that in force or effect on November 1, 1964." 42 U.S.C. 1973c. See 28 C.F.R. 51.2. Since Act 96's redistricting plan is different from the redistricting plan that was in effect on November 1, 1964, Act 96 must be precleared under Section 5.

Appellees contend (Mot. to Dis. 12-13) that preclearance may be avoided because court-ordered plans are not subject to preclearance under Section 5 and Act 96 adopts a court-ordered plan. That contention is incorrect. Under this Court's decision in *McDaniel* v. *Sanchez*, 452 U.S. 130, 153 (1981), the preclearance requirement applies whenever a redistricting plan "reflect[s] the policy choices of the elected representatives of the people—no matter what

constraints have limited the choices available to them." Act 96 clearly reflects the policy choices of Louisiana's elected representatives. It is therefore subject to the preclearance requirement under *McDaniel*, even though the same redistricting plan was not subject to preclearance when the district court ordered it into effect.

The Senate Report accompanying the 1975 extension of Section 5, which was cited by the Court in *McDaniel*, 452 U.S. at 148-149, leaves no doubt that Congress intended to require preclearance of legislation that adopts a court-ordered plan. It states that:

> The one exception where Section 5 review would not ordinarily be available is where the court, because of exigent circumstances, actually fashions the plan itself instead of relying on a plan presented by a litigant. This is the limited meaning of the "court decree" exception recognized in *Connor* v. *Johnson*, 402 U.S. 690 (1971). Even in these cases, however, if the governmental body subsequently adopts a plan patterned after the court's plan, Section 5 review would be required.

S. Rep. No. 295, 94th Cong., 1st Sess. 18-19 (1975) (citation omitted).

Because Act 96 has not been precleared and is not legally effective, the appeals from the district court's judgment invalidating Act 1 are not moot. For purposes of deciding whether an appeal is moot, the relevant inquiry is whether the Court can grant effective relief. *Church of Scientology of California* v. *United States*, 506 U.S. 9, 12-14 (1992). Effective relief can be granted here. If the Court reverses the district court judgment, Act 1 would become the State's legally effective redistricting plan and future elections would

be held in accordance with that plan. The appeals in this case are therefore not moot.*

2. As we argue in our Jurisdictional Statement, in holding that District 4 in Act 1 is unconstitutional, the district court failed to give sufficient weight to Louisiana's traditional redistricting practices. In particular, the district court failed to evaluate the constitutionality of District 4 in light of the similarity of that district to old District 8. That legal error infected both the court's determination that strict scrutiny was applicable and its determination that District 4 does not satisfy the compactness requirement set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). See J.S. 13-14, 16-17. The district court also made several clearly erroneous findings concerning the role that race played in the redistricting process. J.S. 14-16. Those legal and factual errors warrant this Court's plenary review.

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* If the Court were to conclude that the appeals are moot, the correct course would be to vacate the district court's judgment. *Department of Treasury* v. *Galioto*, 477 U.S. 556 (1986); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). Otherwise, parties in future litigation would be free to argue that the United States and defendant-intervenors are bound by determinations made by the district court in this case. The United States and the defendant-intervenors "ought not in fairness" be subject to such consequences. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 391 (1994). In arguing that a determination of mootness should not lead to vacation of the judgment below, appellees rely (Mot. to Dis. 14) on the Court's holding in *U.S. Bancorp*, 115 S. Ct. at 393, that a party who voluntarily moots an appeal is not entitled to the equitable remedy of vacatur. That holding may be applicable to the State of Louisiana; it has no application to either the United States or the defendant-intervenors.

Appellees nonetheless argue that, if the Court reaches the merits, it should summarily affirm the district court's judgment. Mot to Dis. 15-25. Our Jurisdictional Statement addresses most of the arguments made by appellees in support of the judgment below. We limit our response here to the arguments made by appellees that we have not previously addressed.

a. Appellees contend (Mot. to Dis. 16, 23) that Ronald Weber's testimony on mathematical measures of compactness supports the district court's finding that District 4 is not geographically compact. The Constitution, however, does not require a State to construct its districts in accordance with mathematical models of compactness. See *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993). The relevant inquiry is whether the State concluded in "good faith" that District 4 was reasonably compact when compared with old District 8. *Miller* v. *Johnson*, 115 S. Ct. 2475, 2488 (1995). Since District 4 is only ten miles longer than one version of old District 8, and is similar in appearance to various versions of it, the State acted in good faith when it concluded that District 4 is reasonably compact.

In any event, appellees have not fairly characterized Weber's testimony. Weber calculated three "mathematical" measures of compactness: a population test, a dispersion test, and a "max aspect" test. Weber Test., 10/30/95 p.m., Tr. 161. Weber testified that District 4 scored approximately as well or better on the population test as all five versions of old District 8 in place since 1970. *Id.* at 162-163. He testified that District 4 in Act 1 scored worse on the dispersion test than the 600 mile-long Z-shaped District 4 in Act 42. *Id.* at 103-104. That testimony

raises serious questions about the validity of the dispersion test as a measure of compactness. And Weber admitted that the max aspect test was unreliable. *Id.* at 161. Accordingly, to the extent that Weber's testimony is relevant, it reinforces the conclusion that the State acted in good faith when it determined that District 4 in Act 1 is reasonably compact when compared to old District 8.

b. Appellees also err in relying (Mot. to Dis. 21) on Weber's testimony that District 4 in Act 1 more closely resembles the 600 mile-long Z-shaped District 4 in Act 42 than old District 8. Weber focused exclusively on the overlap in population among the districts. *Ibid.* The State, in contrast, reasonably focused on the size, geographic location, and appearance of the districts as well. When assessed against all the relevant criteria, District 4 resembles old District 8 far more than the Z-shaped district.

c. Appellees contend (Mot. to Dis. 18-19) that Glenn Koepp testified that he used only racial information in constructing the boundaries of District 4. The testimony cited by appellees, however, shows only that Koepp's computer contained racial data, and that it did not contain certain other data, such as socioeconomic data. The testimony does not remotely suggest that Koepp used only racial data in constructing the districts. Indeed, in a passage in his testimony omitted by appellees, Koepp made clear that the computer program he was using allowed him to compare the district he was drawing with districts in other plans. Koepp Dep. at 79. Koepp also testified that he considered other factors in devising District 4, including compactness and contiguity. *Id.* at 45-46, 146-148; Koepp Test., 7/21/94 a.m., Tr. 13-14, 25. Appellees' assertion that Koepp testified that he relied

exclusively on race in drawing District 4 is therefore incorrect.

d. Appellees contend (Mot. to Dis. 19) that a letter written by the head of the Civil Rights Division of the Department of Justice to counsel for the defendant-intervenors "loudly proclaimed DOJ's maximization policy" and "foreordained" that race would predominate in the redistricting process. Appellees are mistaken. The letter cited by appellees responded to an inquiry by counsel for the defendant-intervenors concerning whether the decision in *Hays I* invalidating Act 42 had affected the views expressed by the Department of Justice in the *Hays I* litigation. In that litigation, the Department had argued that the State had a strong basis in evidence for its conclusion that the Voting Rights Act required the drawing of a second majority-black district. The letter made clear that the Department had not changed its view. It stated that:

> Evidence in the record [of the *Hays I* proceeding] demonstrates that the three preconditions under *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), are satisfied, giving Louisiana a strong basis for taking action to avoid a Section 2 violation. The plaintiffs' own plans, developed and presented at trial by Dr. Weber, demonstrate that the black population is sufficiently numerous and geographically compact such that two reasonably compact districts with black voting age population majorities can be drawn. In addition, there is uncontradicted evidence that voting is racially polarized in congressional elections, sufficient to satisfy the second and third *Gingles* preconditions.

PX 21, at 2. That discussion reflects a straightforward application of the standards set forth by this Court in *Gingles* for determining whether the preconditions for a Section 2 violation have been established. It is not evidence of a "maximization policy."

Appellees' assertion that the Department of Justice letter "foreordained" the State's policy choices is also unsupported by the record. Glenn Koepp devised his plan without having had any communication with the Department of Justice concerning that plan. Koepp Dep. at 134. The State Senate passed Koepp's plan, containing two majority-black districts, before the Department of Justice sent the letter to counsel for defendant-intervenors. And not a single state legislator testified that the letter affected his vote on Act 1.

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For the foregoing reasons, as well as those in our jurisdictional statement, the Court should note probable jurisdiction.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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